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75128—34——1

In the Supreme Court of the United States

OCTOBER TERM, 1934

CHESLEY W. JURNEY, PETITIONER

v.

WILLIAM P. MACCRACKEN, JR., RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF

PETITION

Chesley W. Jurney, Sergeant at Arms of the United States Senate, petitioner herein, prays that a writ of certiorari issue in accordance with the provisions of subsection (a) of Section 240 of the Judicial Code, as amended and reenacted by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938) to review a judgment of the United States Court of Appeals for the District of Columbia, entered July 9, 1934, in a case entitled *William P. MacCracken, Jr., appellant* v. *Chesley W. Jurney, appellee,* No. 6166 (R. 121). That judgment reversed a judgment of the Supreme Court of the District of Columbia, which had discharged a writ of habeas corpus and dismissed the petition upon which the writ had been issued, whereby the said

MacCracken had sought his release from the custody of petitioner, as Sergeant at Arms of the Senate of the United States, by whom he had been arrested pursuant to a warrant issued under a resolution of the Senate (R. 103).

QUESTION PRESENTED

The power of the Senate to arrest and bring before it for punishment a recalcitrant witness, who, after being served with a subpoena requiring him to produce his files touching a subject properly under investigation by the Senate, wilfully secretes or destroys documents in those files, or permits them to be secreted and destroyed.

STATEMENT OF THE CASE

The Senate of the United States on February 25, 1933, adopted Senate Resolution No. 349, 72d Congress, Second Session, directing a special committee to make a full, complete, and detailed inquiry into existing contracts for the carrying of air mail and ocean mail, and to report to the Senate the result of its investigation and its recommendations (R. 14).

The respondent is an attorney at law and represented the Western Air Express, Pan-American Airways, Transcontinental & Western Air, and other corporations interested in air-mail contracts (R. 20–26).

Pursuant to Senate Resolution No. 349, the special committee, on January 31, 1934, issued and

had served on the respondent its subpoena commanding him to appear instanter and to—

> bring all books of account, bank pass books, canceled checks, check stubs, deposit slips, papers, memorandums, correspondence, maps, copies of telegrams, relating to air-mail and ocean-mail contracts (R. 15).

The respondent appeared before the Senate Committee, but failed to produce any of the papers demanded, justifying his refusal on the ground that they were privileged under the relationship of attorney and client existing between him and those whom he represented (R. 16–26).

However, at the suggestion of the Committee, he sent a telegram to numerous clients, asking if they would waive the privilege claimed and authorize the production of the documents (R. 27, 28). The respondent telegraphed the Western Air Express, of which Harris M. Hanshue was president (R. 8), and asked whether this company would waive the privilege and authorize him to make the files in his possession available to the Committee. On February 1, 1934, Hanshue, by telephone, informed him that before he could decide on the subject of the telegram he desired an opportunity to look over the papers in respondent's files relating to the company's matters and to examine certain personal papers, copies of which be believed were in some of the files, and was sending for that purpose one Gilbert Givven, one-time secretary to Hanshue and the Washington representative of the West-

ern Air Express. That afternoon the said Givven made an appointment and called at the office of respondent, who permitted him to examine the file folders in the office and take therefrom certain papers, some of which related to air-mail contracts (R. 8). On the same day one Brittin, the executive vice president of the Northwest Airways, to whom the respondent had telegraphed, appeared at the office of the respondent but MacCracken being engaged, went to the office of Mr. Lee, his partner, went through the voluminous Northwest files (R. 60) and took six papers out (R. 61). The respondent's partner, Lee, either went out and got the files which were examined with his permission, or sent for them (R. 62). Brittin took these papers down to his office and tore them up and threw them in the waste basket (R. 66).

On February 2, 1934, the respondent was again called before the Committee and interrogated, and thereafter the special committee made a report to the Senate (No. 254), (R. 70) to the following effect: (1) That the committee had caused to be served on the appellant MacCracken a subpoena, as hereinbefore set out; (2) that the said MacCracken had appeared before the committee, "but has failed, refused, and declined to bring with him to the committee, or to make available for inspection, his correspondence and memorandums relating to air-mail contracts"; (3) that the said MacCracken had not only failed, declined and refused to bring

such correspondence and memorandums to the committee, or to make it available for the committee's use, but had declined in an open session of the Senate Committee on January 31, 1934, and again at a public session of the committee on February 2, 1934, to bring said papers and correspondence to the committee and admitted at said public session of the committee "that between the date of the serving of the subpoena and the time of his testimony two certain files of correspondence concerning air mail has been removed from his office with his knowledge and consent"; (4) that the said MacCracken based his refusal upon his claim that as an attorney he had the right to determine for himself whether or not the correspondence and memorandums were private and confidential communications.

The committee further requested the Senate to take such action as it deemed wise to bring the said MacCracken before the bar of the Senate and require him to produce the papers and correspondence (R. 70–71).

In response to this report, the Senate, by Resolution No. 169, directed a warrant to issue, commanding the Sergeant at Arms to take into custody the said MacCracken before the bar of the Senate, and to bring the correspondence, memorandums, books, and files referred to (R. 72, 73).

This warrant was served upon the respondent on February 2, 1934, and he was paroled in the custody

of his counsel to appear at the bar of the Senate at noon, February 5, 1934. On that date the Senate adopted Senate Resolution No. 172 (R. 80), that the President of the Senate issue a citation directing MacCracken and others to show cause why they should not be punished for contempt of the Senate, on account of the destruction and removal of certain papers, files, and memorandums from the files of MacCracken, after a subpoena had been served upon him, and upon the adoption of this Resolution he was directed to be released from custody under Senate Resolution No. 169.

On February 5, 1934, the President of the Senate issued the citation to the Sergeant at Arms (R. 85) commanding him to summon the said MacCracken to show cause why he should not be punished for contempt (R. 12), and the Sergeant at Arms cited the respondent to appear before the bar of the Senate on February 9, 1934.

The respondent did not appear at the bar of the Senate in response to the citation, but declined to do so, alleging that the Senate was exceeding its constitutional authority in issuing the citation (R. 13, 93–101).

On February 9, 1934, the Senate issued a warrant, directing the Sergeant at Arms to arrest the respondent and bring him before the bar of the Senate to show cause why he should not be punished for contempt (R. 13–14).

On February 12, 1934, the petitioner arrested the respondent and that day the respondent filed in the Supreme Court of the District of Columbia, his petition for a writ of *habeas corpus* (R. 1), which was immediately issued, returnable forthwith (R. 13). In response to this writ the petitioner herein immediately produced the respondent in court and demurred to the petition as insufficient in law on the grounds that the petition for the writ presented only the question of the jurisdiction of the Senate; that the petition showed on its face that the Senate was exercising a legislative function in the proceedings complained of and that the Senate, where an act interferes with its legislative functions has power in preservation of its functions without resort to judicial proceedings to exercise its authority to punish for contempt even though the offending act has been committed (R. 101–102).

The Court, after argument, remanded the appellant to the custody and control of the appellee, discharged the writ, and dismissed the petition (R. 103). On appeal to the United States Court of Appeals for the District of Columbia, that judgment was reversed (R. 121), two justices dissenting. The Court in substance held that the Senate was without jurisdiction to inflict punishment upon MacCracken under its Resolution No. 172, because in its view, his act of disobedience was a completed act and as the Senate's inquiry in aid

of its legislative function had ended so far as MacCracken was concerned, there was no obstruction of that legislative function, but that the Senate was assuming to impose punishment as punishment for the respondent's alleged contempt.

REASONS FOR GRANTING THE PETITION

The reasons relied upon by the petitioner for the issuance of a writ of certiorari and upon which it is believed this petition ought to be granted are:

The case involves a question of much importance affecting the power and authority of the Senate of the United States to deal with a contumacious witness. It is desirable that this question be definitely determined in the interest and for the guidance of the two Houses of Congress in future proceedings and also of those who may be involved, concerned in, or affected by such proceedings.

BRIEF IN SUPPORT OF PETITION

OPINIONS

No opinion was rendered by the Supreme Court of the District of Columbia. The opinion of the Court of Appeals has not been published but appears on pages 109 to 121, inclusive, of the record.

JURISDICTION

The judgment of the Supreme Court of the District of Columbia discharging the writ of habeas corpus and dismissing the petition was entered

February 12, 1934 (R. 103). An appeal therefrom to the Court of Appeals was noted in open court (R. 104). The judgment of the Court of Appeals reversing the judgment of the lower court was entered July 9, 1934 (R. 121). The jurisdiction of this Court is invoked under subsection (a) of Section 240 of the Judicial Code as amended and reenacted by the Act of February 13, 1925 (c. 285, 43 Stat. 936, 938).

STATEMENT OF THE CASE

The Court is respectfully referred to the statement of the case contained in the petition for the writ of certiorari above given.

ARGUMENT

I

RESPONDENT'S REFUSAL TO PRODUCE THE BOOKS AND PAPERS UNDER THE SENATE SUBPOENA IS NO LESS (BUT MORE) A CONTEMPT OF THE SENATE BY REASON OF HIS SUBSEQUENT WILFUL OR NEGLIGENT SECRETION OR DESTRUCTION OF THEM AND THE RIGHT OF THE SENATE TO PRESERVE ITS FULLEST LEGISLATIVE POWER AND PUNISH FOR SUCH CONTEMPT IS NOT AFFECTED BY SUCH DESTRUCTION OR SECRETION

The warrant of arrest (R. 14) directed the Sergeant at Arms to take the respondent into custody and bring him forthwith before the Senate "to show cause, if any he has, why he should not be punished for contempt of the Senate for the matters and things as shown by the reports of the spe-

cial Senate Committee on Ocean and Air Mail contracts * * *."

These reports, as hereinbefore set out, declared that the respondent had failed, refused, and declined to bring or make available for inspection his correspondence and memorandums relating to air mail, and that he had admitted at a public session of the committee that between the date of the serving of the subpoena and the time of his testimony two certain files of correspondence concerning air mail had been removed from his office with his knowledge and consent.

It is thus clear that the removal of the files of correspondence from the respondent's office was but an incident and an aggravation of his contempt of the Senate, and was not the sole act of contempt or a substantive offense for which he was arrested and taken into custody before the bar of the Senate. As stated by Mr. Justice Groner (R. 118):

> The sole question involved on this appeal is the power of the Senate to arrest and bring before it for punishment a private citizen who, after being served with subpoena requiring him to produce his files relating to a matter then properly under investigation, allows documents in the files to be withdrawn so that he cannot comply with the terms of the subpoena.

"The justification or extenuation of the act complained of here has no place in a proceeding of this character" (Justice Groner's dissenting opinion, R–120), and the facts and arguments presented to

show that the recusant witness attempted to purge himself of his contempt must be presented to the Senate. *Henry* v. *Henkel,* 235 U.S. 219, 229.

The contention made below by the respondent, baldly stated, is that if destruction is added to the refusal to produce the documents, there is no longer an obstruction of the exercise of the legislative power and this puts it beyond the power of the Senate to cite the recusant witness for contempt, and has the same effect as if the Senate had never had the power. This is to destroy the power of the Senate to punish for contempt a witness who refuses to produce documents, because the witness can always destroy or secrete these documents and make it impossible to comply with the demand of the Senate. This proposition, it seems to us, refutes itself, "for to so hold would be to admit the authority and at the same time deny it."

Since the power of the Senate to require the production of documents and to punish for refusal to produce, cannot be doubted (*McGrain* v. *Daugherty,* 273 U.S. 135), the exercise of this authority by the Senate cannot be impaired by the wilful or negligent conduct of the witness in secreting or destroying documents.

II

THE POWER OF THE SENATE TO PUNISH WHEN THE ACT COMPLAINED OF HAS BEEN COMMITTED

The object of the Senate in ordering an investigation of air and ocean-mail contracts was to aid it

in legislating. "The power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *McGrain* v. *Daugherty, supra.* If, however, it can be argued that the Senate caused the arrest of the appellant, not merely for his refusal to produce the required memorandums and papers, but also for his aggravation of this offense in removing or permitting them to be removed and secreted or destroyed, and that the removal or destruction of these papers was a completed act, nevertheless, under the implied power to preserve its functions, and without resort to judicial proceedings under the general criminal law, the Senate has authority to punish, even though the act complained of has been committed when the authority is asserted.

In support of this position we confidently rely upon *Marshall* v. *Gordon,* 243 U.S. 521. There the court in its opinion delineated the extent of the implied power of the House of Representatives to deal with contempts by a non-member. After reviewing cases, it was said, p. 544:

> * * * *that where a particular act, because of its interference with the right of self-preservation, comes within the jurisdiction of the House to deal with directly under its implied power to preserve its functions,* and therefore without resort to judicial proceedings under the general criminal law, *we are of opinion that authority does not cease to exist because the act complained of had*

> *been committed when the authority was exerted, for to so hold would be to admit the authority and at the same time to deny it.* On the contrary, when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority, we are of opinion that jurisdiction is acquired by Congress to act on the subject, and therefore there necessarily results from this power the right to determine, in the use of legitimate and fair discretion, how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence; that is to say, the continued existence of the interference or obstruction to the exercise of the legislative power. (*Italics ours.*)

It is clear from this language that the implied power to punish for contempt embraces the power to compel the production of documents in order that the legislative functions may be performed, to compel the contumacious witness to testify in order that the legislative functions may be performed, and to punish for contempt the refusal to produce documents which inherently obstructs or prevents the discharge of legislative duty, and *a fortiori* to punish for contempt the obstruction and prevention of the discharge of legislative duty by the destruction of such documents.

It is also settled that the power of a House of Congress to punish for contempt and the statutory enactment which makes such contempt a misdemeanor are not antagonistic and that both Con-

gress and the courts could punish a contumacious witness without subjecting him to jeopardy twice for the same offense. *Re Chapman,* 166 U.S. 661.

Further, there is no distinction in principle between the judicial and the legislative power to summarily punish for contempt. *Toledo Newspaper Company* v. *United States,* 247 U.S. 402. In that case it was held that the principles applicable to the legislative and judicial power to punish summarily are identical, and that the test of the power of the courts is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty. The principle being the same, there can be no question that the acts of respondent were in contempt of the Senate and had a direct tendency to obstruct the discharge of its legislative duty.

Both the courts and the Senate are inherently empowered to protect themselves and the function they perform by summary proceeding, the court without a jury and the Senate without resort to judicial proceedings under the criminal law, to vindicate their authority and to deter other like derelictions. *Ex Parte Grossman,* 267 U.S. 87, 111, 117–118.

COMPLETED ACT

It is idle to argue that the powers of the Senate cannot extend to a "completed act." If the power of the Senate to cite for contempt or to punish for a contempt was limited as appellant seeks to limit

it to acts not completed, then the power would cease before there could arise any occasion for its exercise. Refusal of a witness to testify is a "completed act" and gives occasion for the exercise of the power to cite and punish. Respondent admits, as he must, in the light of the many adjudications, that such a refusal warrants the exercise of the power.

Finally, the secretion or destruction of the documents sought by the Senate's subpoena was no more a "completed act" than the refusal of the appellant to testify. The contempt embracing both committed acts was complete when the warrant of arrest was issued. To admit the Senate's power in the one act and deny it in the more aggravated contempt subjects the power of the Senate to preserve its legislative function to the caprice, wilfulness, or malice of the recusant witness and permits such witness to purge himself by making his contempt more offensive. As was said by Mr. Justice Groner in his dissenting opinion (R. 119):

> To say at one moment that the power exists to punish for failure to deliver papers, and then to say that it is lost if the contumacy of the witness results in destruction rather than in deliberate withholding, seems to me to be both inharmonious and absurd. * * * Did this act of petitioner, which made compliance with the subpoena impossible, convert the contempt into an offense for which punishment could only be im-

> posed—if at all—by another tribunal? I can think of no good reason to suppose it did. The answer, it seems to me, depends upon the question, whether the act complained of tended to obstruct the free exercise by the Senate of its legislative functions. If it did, manifestly it was a contempt of the authority which had a right to require it to be done. To admit this and then to say that, because the nature of the act done made compliance impossible, the authority to impose punishment for the recalcitrancy was lost, appears to me to establish a distinction destructive of the purpose out of which the right arises and to make the power itself impotent and fruitless.

IMPORTANCE OF THE CASE

This case justifies the granting of the writ of certiorari. The decision of the majority of the Court below that Congress has no inherent power to punish a recusant witness who, in defiance of its subpoena to produce, destroys documents properly sought by it, is squarely in the teeth of the opinion in *Marshall* v. *Gordon, supra*, to the effect that the authority to punish "does not cease to exist because the act complained of had been committed when the authority was exerted."

In the light of this opinion, it is of tremendous importance to Congress, as well as to those citizens affected by investigations of the kind here involved, to have this Court definitely determine

whether the act of the recusant witness in destroying documents under subpoena by Congress, nullifies the power of punishment essential to its self-preservation and inherent in it, and thus effectually annihilates its power to require the production of documents.

CONCLUSION

It is respectfully submitted that the petition for the writ of certiorari should be granted.

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